86-1091

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

ROGER R. LARSON,

Petitioner,

vs.

GENE C. O'CONNELL, FOX PROPERTIES, INC., JAMES A. CHILIGIRIS, A.A. PALOW, CHARLES R. BRILLMAN, GILBERT J. OBERLIN, JOHN DONALD FERRY, BERLE W. BURHENN, and IVAN TELLEFSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

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QUESTIONS PRESENTED

1. Whether ILL.REV.STAT. 1983, Ch. 110, section 2-1402, is unconstitutional as applied to the Petitioner in this case and as construed by the Appellate Court for the Fourth District for the State of Illinois, by allowing for the entry of a judgment against the Petitioner when the court lacked both subject matter jurisdiction, and personal jurisdiction, under the statute relied upon for the entry of the judgment.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Fourth District, entered on June 3rd, 1986.

OPINIONS BELOW

The opinion of the Appellate Court of the State of Illinois, Fourth District, in *O'Connell, et al. v. Pharmaco,* is reported at 143 ILL.APP.3d 1061, 493 N.E.2d 1175 (Fourth Dist. 1986). A copy of the opinion is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C., section 1257(3) for review by certiorari of the decisions of the Illinois Appellate Court, Fourth District. A written opinion was issued by that court on June 3, 1986. Rehearing was denied by that court on July 3, 1986. Petitioner sought leave to appeal to the Illinois Supreme Court in a timely fashion. On October 2, 1986, the Illinois Supreme Court denied the petition for leave to appeal. A copy of the order denying the petition for leave to appeal is included in the appendix as Exhibit B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Revelant provisions of the Fourteenth Amendment to the Constitution of the United States and ILL. REV.STAT. 1983, Ch. 110, section 2-1402, are set forth in the Appendix as Exhibits C and D.

STATEMENT OF THE CASE

On March 15th, 1979, a Judgment was entered against Pharmaco, Inc., in the amount of $34,384.00, plus costs of suit as a result of a Default Judgment having been entered in favor of the Plaintiffs and against the sole Defendant, Pharmaco, Inc., in a Complaint for Forcible Entry and Detainer.

Thereafter, citation proceedings were commenced by the Plaintiff by the service of a citation directed to the sole Defendant, Pharmaco, Inc., in c/o Roger Larson, Corporate Officer. (R.C. 27-32), (R.C. 66). Pursuant to the citation, the deposition of Roger Larson, Pharmaco Inc.'s Chief Executive Officer, was taken.

On August 6th, 1985, the Circuit court of Champaign County, Donald R. Parkinson, Associate Judge presiding, entered a Judgment against Roger Larson in his personal capacity and ordered that he personally satisfy the Forcible Entry and Detainer Judgment which had previously been entered against Pharmaco, inc.

The record is clear that no citation was ever issued against, or directed to, Roger Larson, individually, at any time prior to the entry of the August 6th judgment against him. No summons was ever issued against him, or directed to him individually. No complaint or pleading of any type or nature was ever filed against him individually. ILL.REV.STAT. 1983, Ch. 110, section 2-1402 as applied to the Petitioner in this case is unconstitutional in that, *as construed by the Appellate Court for the Fourth District*, this statute does not require notice, or an opportunity for a hearing, prior to the entry of a judgment against a third party witness.

REASONS FOR GRANTING THE WRIT

Since this court's decision in *Pennoyer v. Neff* (1877), 95 U.S.714, 24 L.Ed. 565. where this court specifically stated that

> the essence of due process requires that there be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the Defendant, he must be brought within its jurisdiction by service of process within the State or his voluntary appearance. (at 733)

it has been an axiom of American law that due process requires both subject matter and personal jurisdiction in order for a judgment to stand.

ILL.REV.STAT. 1983, Ch. 110, section 2-1402, specifically requires that a citation be served upon an individual prior to the entry of a judgment against him, or that, with leave of court, a complaint be filed against him to provide him with notice, and an opportunity for a hearing prior to the entry of a personal judgment against him. The statute on its face obviously meets constitutional muster.

The statute as applied to the Petitioner in this case, however, is unconstitutional in that it has been construed by the Fourth District Appellate Court to not require service of a citation or the filing of pleadings of any type or nature prior to the entry of a judgment.

If allowed to stand, the decision of the Appellate Court for the Fourth District, results in a judgment being entered against an individual who has never been joined as a Defendant in any proceedings, who has never had a complaint or other pleading filed or directed against him,

who has never been joined as a third party citation defendant, or as a party to any proceedings of any type or nature which would justify or authorize the entry of judgment against him under Section 2-1402 of the Code of Civil Procedure of the State of Illinois (ILL.REV. STAT. 1983 Ch. 110, section 2-1402).

The constitutional infirmity in this case is not as a result of the statute, *as written*, but as applied and construed by the Appellate Court for the State of Illinois.

CONCLUSION

Because of the importance throughout our history, and to our system of law, that an individual must be placed on notice as to the issues he will be confronted with, and have an opportunity for a hearing, as evidenced by this court's decision in *Pennoyer v. Neff* more than one hundred years ago, this Court should grant a writ of certiorari to review the judgment and opinion of the Appellate Court for the Fourth District of the State of Illinois.

Respectfully submitted,

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APPENDIX

143 Ill.App.3d 1061

493 N.E.2d 1175

Gene C. O'CONNELL, Fox Properties, Inc., James A. Chiligiris, A.A. Palow, Charles R. Brillman, Gilbert J. Oberlin, John Donald Ferry, Berle W. Burhenn, and Ivan Tellefson, Plaintiffs-Appellees,

v.

PHARMACO, INC., et al., Defendants,

Roger R. Larson, Defendant-Appellant.

No. 4-85-0605.

Appellate Court of Illinois,
Fourth District.

June 3, 1986.

Rehearing Denied July 3, 1986.

* * *

Presiding Justice McCULLOUGH delivered the opinion of the court:

Defendant, Roger R. Larson, appeals from a judgment entered against him in his personal capacity in a citation proceeding originated by the plaintiffs against the defendant, Pharmaco, Inc. On appeal, Larson contends (1) that the trial court lacked both subject matter and personal jurisdiction over him, (2) that there was no evidence to support the trial court's conclusion that defendant held any assets of the judgment debtor, (3) that the judgment must be reversed because all necessary parties have not been joined, and (4) that the trial court erred in the calculation of interest due on the judgment.

The record before us reflects a lengthy chronology of events. On March 15, 1979, a default judgment was en-

tered in favor of plaintiffs and against defendant, Pharmaco, Inc., on plaintiffs' complaint for forcible entry and detainer. Damages were awarded in the amount of $34,384. Supplementary proceedings were begun by the plaintiffs in 1983, by service of a citation upon "PHARMACO, INC., c/o Roger Larson-Corporate Officer." Roger Larson initially appeared by counsel on November 21, 1983, and requested a continuance because of his ill health. The continuance was granted and Larson again appeared *pro se* at the rescheduled hearing on December 7, 1983. The court ordered that the citation be heard in the presence of a court reporter as by deposition and that Larson produce documents at such deposition pursuant to notice.

On January 5, 1984, a hearing was held. Larson appeared *pro se* and orally moved to quash the citation on the ground that some of the plaintiffs were former directors of the defendant corporation and had the opportunity to examine the records of the corporation without his having to produce them. The motion was denied. A second oral motion to quash citation based on a stipulation to dismiss a Federal lawsuit was also denied.

A citation by deposition was subsequently taken. After a hiatus of over one year, on January 24, 1985, a hearing was held on plaintiffs' motion to supplement evidence. Larson again appeared, *pro se*.

At the January 24, 1985, hearing Larson testified on examination by counsel for the plaintiffs that he had been chairman of the board and chief executive officer of the now dissolved Pharmaco Corporation. Larson claimed that Pharmaco became insolvent December 31,

1978, three months prior to the entry of the default judgment against it. Larson acknowledged, however, that in May of 1982, a Federal patent infringement lawsuit filed by Pharmaco against various defendants was settled in Pharmaco's favor for $600,000. Although Larson maintained that the money obtained from this settlement was deposited for Pharmaco's benefit, he acknowledged receipt of $580,000 of the settlement. The remaining $20,000 had been retained by a bank in settlement of a corporate debt.

As to his entitlement to those funds, Larson further testified that pursuant to an agreement with Pharmaco, ratified by the board of directors, he was to receive half of any settlement of the patent infringement suit contingent upon his paying attorney's fees in that lawsuit. Plaintiffs stipulated that such a contract existed.

With regard to the remaining $280,000, Larson maintained that he had been awarded a default judgment against Pharmaco in the amount of $218,000 plus interest and that subsequent to this 1982 judgment Larson took an assignment from Pharmaco of the remaining proceeds from the settlement in satisfaction. Larson acknowledged drafting the assignment but claimed the board of directors of Pharmaco subsequently ratified his actions.

Upon this testimony plaintiffs maintained that Larson had in his control $280,000 in assets which were rightfully those of Pharmaco. Plaintiffs then asked that the court order Larson to account for the funds received from the corporation. Larson objected contending that the board had ratified the assignment of proceeds. When asked by the trial court whether these actions were re-

corded by the board, Larson responded, "I don't have them. This was a citation to discover assets. It isn't a lawsuit. I'm not on trial, Pharmaco is."

The trial court then ordered Larson to destroy no records of the defendant corporation without permission of the court and further ordered him to preserve them in their present condition. Larson was also required to account for all sums received from Pharmaco. The cause was continued to February 21, the date Larson was ordered to file the accounting. Larson continued to protest that the citation proceeding was not a "bona fide" lawsuit and, in any event, was against Pharmaco, not him.

On February 21, 1985, a subsequent hearing was held. Larson appeared by counsel and filed a written motion to quash service or to dismiss with prejudice. Attached to the motion was a copy of a citation issued by the clerk of the circuit court of Champaign County on December 18, 1984, and addressed to: "Pharmaco, Inc. c/o ROGER LARSON-Registered Agent & Corp. Officer." Plaintiffs, the day earlier, had filed a motion for leave to file creditor's bill naming, as additional parties to the citation proceeding, Larson and his wife. The court continued these motions and a subsequent hearing was held on April 1, 1985, on defendant's motion to quash or dismiss. No transcript of any proceedings on that day appears of record on appeal. The parties were directed, and both filed, written memoranda directed to the motion to quash or dismiss. On June 4, 1985, at a subsequent hearing, defendant's motion to quash or dismiss was denied. No transcript of any proceedings occurring on that day appears of record.

We are thus required to glean the basis for the motion to quash and dismiss solely from the motion, supporting affidavit and memorandum filed by Larson. In substance, Larson argued that the original summons issued in the forcible entry and detainer action was a summons commonly employed in a "small claims" action and, that because of this defect, if a valid underlying judgment to the citation proceedings existed, the amount of the judgment was limited to $1,000, the small claims award limitation in effect in 1979. (See Ill.Rev.Stat.1979, ch. 110A, par. 281.) Alternatively, Larson maintained that at the time of the default he may not have been the registered agent of Pharmaco. As we have indicated, the trial court denied this motion. In addition to plaintiffs' motion to add additional parties, plaintiffs petitioned for issuance of an injunction pursuant to section 2-1402(d)(1) and (2) of the Code of Civil Procedure (Ill.Rev.Stat.1983, ch. 110, par. 2-1402(d)(1), (2)). Plaintiffs also filed a motion for judgment against Larson in an amount sufficient to cover the judgment and interest accrued from 1979. Finally, plaintiffs filed a petition for rule to show cause against Larson based on his failure to provide the accounting previously ordered.

The trial court denied plaintiffs' motion for leave to add additional parties as well as the petition for issuance of an injunction. The petition for rule to show cause and apparently the motion for judgment or other relief were continued.

At a subsequent hearing on June 13, 1985, Larson appeared, *pro se*. Plaintiffs filed additional motions requesting that Larson turn over certain money obtained

by him from Pharmaco and [a request for] additional information from Larson. The request for additional information was allowed and the request to turn over money was reserved. On July 30, 1985, the parties again appeared for hearing. Counsel for Larson made an oral motion to withdraw, which the court allowed. Larson then filed a *pro se* memorandum in response to plaintiffs' claims that Larson improperly obtained Pharmaco funds.

A hearing on all pending notions was held August 6, 1985. Larson again appeared, *pro se*. At the conclusion of the hearing he was ordered to pay the judgment plus costs and interest within 30 days unless the amount of costs and interest was in dispute. The parties thereafter appeared on August 29, 1985, and Larson filed a *pro se* motion to alter or amend the judgment. Larson also filed a motion for stay of the citation proceeding which was denied. Larson voiced no objection to the statement of interest submitted by plaintiffs and Larson's motion to alter or amend the judgment was thereafter denied. An oral motion by Larson for change of venue was made, but the court directed him to place this motion in writing. On August 30, 1985, Larson filed notice of appeal and a second motion to stay the citation proceeding pending appeal. The trial court thereafter allowed the motion for stay of the money judgment entered upon execution of a bond.

On appeal, Larson initially contends that the trial court lacked subject matter jurisdiction over him because the record fails to disclose that the citation summons was ever served upon him in his personal capacity. Hence, Larson reasons that the trial court could not enter a personal judgment against him and that the judgment is void. We disagree. Subject matter jurisdiction derives from the

constitution and is the power of the court to hear and determine causes of the general class to which this case belongs. (Ill.Const.1970, art. VI, sec 9.) Section 2-1402 of the Code of Civil Procedure allows a judgment creditor to initiate supplementary proceedings for the purpose of examining the judgment debtor or any other person to discover assets or income of the debtor. (Ill.Rev.Stat.1983, ch. 110, par. 2-1402(a).) When assets are discovered, the court may, by appropriate order, compel any person cited other than the judgment debtor to deliver up the assets to satisfy the judgment or enter any order or judgment against the person cited that could be entered in a garnishment proceeding. (Ill.Rev.Stat.1983, ch. 110, par. 2-1402(b)(3), (4).) A supplementary proceeding is commenced by service of a citation on the party against whom it is brought. (87 Ill.2d R. 277(b).) If it appears that any property discovered is claimed by any person other than the judgment debtor, the court shall, as in garnishment proceedings, permit or require the claimant to appear and maintain his right. (Ill.Rev.Stat.1983, ch. 110, par. 2-1402(e).) Any interested party may subpoena witnesses and adduce evidence as upon the trial of any civil action. 87 Ill.2d R. 277(e).

Here, it is without question that the citation was properly filed and served upon Pharmaco through its corporate officer. The trial court clearly had subject matter jurisdiction over the citation proceeding irrespective of any alleged failure to serve defendant in his personal capacity. Defendant's argument that subject matter jurisdiction did not obtain is without merit since the provisions of the Code of Civil Procedure governing supplementary proceedings clearly contemplate the possible addition of other

parties after commencement of the proceedings. Unlike the issue of jurisdiction over the person, subject matter jurisdiction is not subject to division or apportionment. It either exists or it does not. Defendant's argument would require us to conclude that a trial court lacks subject matter jurisdiction in a citation proceeding unless and until all possible parties holding assets of the judgment debtor are properly joined; even though their existence might not be known at the initiation of supplementary proceedings. That this conclusion cannot be countenanced is obvious. If the trial court lacks subject matter jurisdiction as against one defendant who has not been joined, it would necessarily lack subject matter jurisdiction even as against those who had been properly served with a citation summons.

Defendant also asserts that the court lacked personal jurisdiction over him because no summons was ever issued to defendant in his personal capacity. Therefore, defendant reasons the entry of a personal judgment against him was void. Although defendant in the trial court complained variously that the proceeding was not a lawsuit against him, defendant never formally objected to the jurisdiction of the trial court over him personally. By his participation in the trial proceedings and numerous requests for relief from the trial court, we conclude defendant acknowledged the authority of the trial court to act and entered a general appearance, thereby waiving any possible defect in service of the citation. (*Cf. Page v. Dept. of Law Enforcement* (1986, 4th Dist.), 142 Ill. App.3d 788, 96 Ill.Dec. 914, 491 N.E.2d 1374.) Generally, service of summons upon a defendant is essential to create jurisdiction of the court. However, a defendant may waive

the service of process and confer jurisdiction over his person upon the court. This may be done where a defendant fails to limit his appearance before the court to the narrow issue of service of process and instead at the same time seeks further relief from the court. (*Community Bank & Trust Co. v. Pavlich* (1980), 84 Ill.App.3d 1080, 1082, 40 Ill.Dec. 463, 406 N.E.2d 164, 166.) Our review of the record conclusively demonstrates that defendant was aware that plaintiffs were attempting to secure a personal judgment against defendant for monies he retained out of the settlement of the Pharmaco patent infringement suit. At no time did defendant enter a limited appearance to challenge the jurisdiction of the court on the ground that he had not been served in his personal capacity. Moreover, once his motion to quash on grounds unrelated to personal jurisdiction was denied, defendant abandoned that position and at various times requested further relief and participated actively in the lawsuit opposing, on the merits, plaintiffs' attempts to secure an accounting for the funds in his possession. *Cf. Craven v. Craven* (1950), 407 Ill. 252, 95 N.E.2d 489.

Although we are somewhat at a loss to understand the court's refusal to permit plaintiffs to file their "creditor's bill" adding defendant as a party to the proceedings, we conclude that the defendant has failed to show any prejudice. The provisions of the Code of Civil Procedure regarding supplementary proceedings are to be liberally construed. (*Kauk v. Matthews* (1981), 100 Ill.App.3d 107, 55 Ill.Dec. 406, 426 N.E.2d 552.) These procedures contemplate that any third party claiming an interest in the subject property must be given a full opportunity to present and maintain his claim. (*Garvey v. Parrish* (1980),

84 Ill.App.3d 578, 40 Ill.Dec. 13, 405 N.E.2d 1105.) Here, defendant clearly had notice of the proceedings and had the ability and took the opportunity to appear and defend. Substantive due process requires only actual notice, that is, reasonable assurance that notice was actually given to the party (*Manley Motor Sales Co. v. Kennedy* (1981), 95 Ill.App.3d 199, 50 Ill.Dec. 679, 419 N.E.2d 947), and that a party has been afforded an opportunity to be heard. *Seno v. Franke* (1960), 20 Ill.2d 70, 169 N.E.2d 335.

Alternatively, defendant contends that personal jurisdiction was lacking because he was never formally made a defendant before judgment was entered against him. Neither section 2-1402 of the Code nor Supreme Court Rule 277 require that a third party be formally made a defendant or a pleading be directed specifically against a third party. In *National Bank of Albany Park in Chicago v. Newberg* (1972), 7 Ill.App.3d 859, 289 N.E.2d 197, an attorney for the judgment debtor contended that he was not personally bound by actions taken in the supplementary proceedings because he was never named as a party. The court disagreed reasoning that although the attorney was not made a formal party, his interest in the debt was adjudicated and he conducted and directed the defense of the judgment debtor. Under such circumstances the attorney was held to be a party though not formally named as such.

Thus, we conclude that although defendant was not formally named as a party or served with a citation in his personal capacity he nevertheless had notice of the proceedings, failed to limit his appearance in the trial court, actively participated and directed the litigation and re-

quested affirmative relief from the court when it became apparent that plaintiffs sought to discover assets of the judgment debtor which he held. Personal jurisdiction over defendant was satisfied.

Defendant next contends that the judgment below is void because he and his wife were necessary parties. The requirement that necessary parties be joined in an action stems from basic notions of due process. (*In re Application of County Collector* (1977), 53 Ill.App.3d 120, 11 Ill. Dec. 321, 368 N.E.2d 929.) As we have indicated defendant received due process. Defendant contends his wife was a necessary party because the "creditor bill" which plaintiffs sought to file attempted to attach property belonging to both Larson and his wife. As we have noted, the trial court denied plaintiffs leave to file this pleading. Moreover, the money judgment entered below does not affect any purported property interest of defendant's wife. Hence, she is clearly not a necessary party.

Defendant counters that since he and his wife were forced to pledge their home as security for bond pending appeal this renders his wife a necessary party. This argument is without merit. The filing of bond subsequent to judgment was a voluntary act. To the extent that defendant's wife, or any other third party, furnishes any or all of the security underlying the appeal bond, certain property rights may arise as between those parties; but that does not make them necessary parties to the appeal or to the underlying lawsuit since the third party commitment to furnish security for the bond is not only independent from the underlying judgment but could not arise until after final judgment was entered.

Defendant next contends that the trial court erred in entering judgment because there was no evidence that he retained any of the corporation's assets. At issue was the $580,000 in proceeds from the settlement between Pharmaco and certain defendants in a patent infringement suit. Defendant contended and plaintiffs agreed that $300,000 of that settlement did not constitute corporate assets. By agreement between defendant and the corporation's board of directors in 1980, defendant agreed to pay the expense of Pharmaco's lawsuit in return for one-half of the settlement.

It is the remaining $280,000 which Larson received which plaintiffs claim were properly assets of the corporation. Larson maintained that he had loaned the corporation $216,000. Among the exhibits was a promissory note dated September 4, 1978, executed by defendant's wife, as secretary of the Pharmaco Corporation, to defendant in the sum of $216,600 plus 11% interest "for value received." Defendant thereafter obtained a default judgment on this note against Pharmaco after serving only his wife, as an officer of the corporation, with process. After the default, defendant's wife executed a corporate assignment, dated September 14, 1981, of Pharmaco's remaining interest in the settlement of any of Pharmaco's lawsuits to the extent of the default judgment which had been entered on the promissory note she issued to defendant. Defendant maintained that subsequent to this "assignment" he presented the full facts of this series of transactions to the board of directors who, defendant maintained, by their acquiescence ratified these actions.

A corporate officer, particularly a director, has a duty not to make transactions on behalf of himself which are

damaging to the corporation and profitable to him. The corporate official, as a beneficiary, has the burden of establishing the fairness of any transaction in which he acquired corporate assets. (*Libco Corp. v. Roland* (1981), 99 Ill.App.3d 1140, 55 Ill. Dec. 334, 426 N.E.2d 309.) Here, defendant was chief executive officer as well as a director of the corporation. An officer or director cannot serve himself first by manipulating the affairs of the corporation to the detriment of shareholders and creditors in disregard of the standards of common decency and honesty. (*Johnson v. Central Standard Life Insurance Co.* (1968), 102 Ill.App.2d 15, 243 N.E.2d 376.) It is also unlawful for corporate directors to manipulate corporate property so as to pay their own claims against the company to the loss of creditors. (*Roseboom v. Whittaker* (1889), 33 Ill.App. 442, *aff'd* (1890, 132 Ill. 81, 23 N.E. 339.) When an officer breaches his fiduciary duty by wrongfully converting or misappropriating funds and thereby adversely affecting the relation between the corporation and its creditors, a creditor can maintain an action against the officer personally. *Circle Security Agency, Ins. v. Ross* (1981), 99 Ill.App.3d 1111, 55 Ill. Dec. 110, 425 N.E.2d 1283.

We conclude that the court below did not err in determining that the proceeds, received by virtue of the purported assignment to defendant executed solely by his wife after entry of a default judgment against the corporation in which only defendant's wife was served with process, were actually assets of the corporation. Since these funds were admittedly in defendant's possession, there was evidence to support the judgment.

Defendant also contends that the calculation of interest on the judgment is erroneous because it amounts to

prejudgment interest against him. He contends interest only runs from the entry of the citation judgment. Section 2-1303 of the Code of Civil Procedure allows for recovery of interest on judgment computed from the time the original judgment was entered. (Ill.Rev.Stat.1983, ch. 110, par. 2-1303.) As plaintiffs correctly note, defendant interposed no objection to plaintiffs' calculation of interest below. Accordingly, the issue might be considered waived. (*Moehle v. Chrysler Motors Corp.* (1982), 93 Ill.2d 299, 66 Ill.Dec. 649, 443 N.E.2d 575.) In any event, defendant's argument on this point is without merit. Interest was properly calculated from the entry of the default judgment against Pharmaco. Hence, the court was not awarding prejudgment interest on the citation judgment; rather, it was awarding post-judgment interest on the default judgment against the corporation.

Defendant's final contention is that the interest computation is incorrect because it includes interest-on-interest. Plaintiffs concede this point and it is clear that Illinois law does not sanction compound interest on judgments. (*Lewis v. Stran-Steel Corp.* (1978), 58 Ill.App.3d 280, 15 Ill.Dec. 368, 373 N.E.2d 714.) In his brief, defendant has offered a recalculation of interest at the proper non-compounded rate. Plaintiffs accept this calculation and although they argue that waiver should apply because defendant failed to object on this ground at trial, they agree to a remittitur to reflect the correct amount of interest. Upon our consideration of this issue, we decline to apply the waiver doctrine and pursuant to our authority under Supreme Court Rule 366(a)(5) (87 Ill.2d R. 366(a)(5)), we modify the judgment below by the entry of a remittitur to reflect an award of interest in the amount of $19,514.10.

Accordingly, for the reasons indicated, the judgment of the Champaign County circuit court is affirmed as modified.

Affirmed as modified.

WEBBER and MORTHLAND, JJ., concur.

63911

ILLINOIS SUPREME COURT
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October 2, 1986

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No. 63911—Gene C. O'Connell, et al., respondents, v. Pharmaco, Inc., et al. (Roger R. Larson, petitioner). Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1986.

* * *

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

2-1402. Supplementary proceedings

§ 2-1402. Supplementary proceedings. (a) A judgment creditor, or his or her successor in interest when that interest is made to appear of record, is entitled to prosecute supplementary proceedings for the purposes of examining the judgment debtor or any other person to discover assets or income of the debtor not exempt from the enforcement of the judgment therefrom, a deduction order or garnishment, and of compelling the application of nonexempt assets or income discovered toward the payment of the amount due under the judgment. A supplementary proceeding shall be commenced by the service of a citation issued by the clerk. The procedure for conducting supplementary proceedings shall be prescribed by rules. It is not a prerequisite to the commencement of a supplementary proceeding that a certified copy of the judgment has been returned wholly or partly unsatisfied.

(b) When assets or income of the judgment debtor not exempt from the satisfaction of a judgment, a deduction order or garnishment are discovered, the court may, by appropriate order or judgment:

(1) Compel the judgment debtor to deliver up, to be applied in satisfaction of the judgment, in whole or in part, money, choses in action, property or effects in his or her possession or control, so discovered, capable of delivery and to which his or her title or right of possession is not substantially disputed.

(2) Compel the judgment debtor to pay to the judgment creditor or apply on the judgment, in installments, a portion of his or her income, however or whenever earned or acquired, as the court may deem proper, having

due regard for the reasonable requirements of the judgment debtor and his or her family, if dependent upon him or her, as well as any payments required to be made by prior order of court or under wage assignments outstanding. The court may modify an order for installment payments, from time to time, upon application of either party upon notice to the other.

(3) Compel any person cited, other than the judgment debtor, to deliver up any assets so discovered, to be applied in satisfaction of the judgment, in whole or in part, when those assets are held under such circumstances that in an action by the judgment debtor he or she could recover them in specie or obtain a judgment for the proceeds or value thereof as for conversion or embezzlement.

(4) Enter any order upon or judgment against the person cited that could be entered in any garnishment proceeding.

(5) Compel any person cited to execute an assignment of any chose in action or a conveyance of title to real or personal property, in the same manner and to the same extent as a court could do in any proceeding by a judgment creditor to enforce payment of a judgment or in aid of the enforcement of a judgment.

(6) Authorize the judgment creditor to maintain an action against any person or corporation that, it appears upon proof satisfactory to the court, is indebted to the judgment debtor, for the recovery of the debt, forbid the transfer or other disposition of the debt until an action can be commenced and prosecuted to judgment, direct that the papers or proof in the possession or control of the

debtor and necessary in the prosecution of the action be delivered to the creditor or impounded in court, and provide for the disposition of any moneys in excess of the sum required to pay the judgment creditor's judgment and costs allowed by the court.

(c) All property ordered to be delivered up shall, except as otherwise provided in this section, be delivered to the sheriff to be collected by the sheriff or sold at public sale and the proceeds thereof applied towards the payment of costs and the satisfaction of the judgment.

(d) (1) The citation may prohibit the party to whom it is directed from making or allowing any transfer or other disposition of, or interfering with, any property not exempt from the enforcement of a judgment therefrom, a deduction order or garnishment belonging to the judgment debtor or to which he or she may be entitled or which may thereafter be acquired by or become due to him or her, and from paying over or otherwise disposing of any moneys not so exempt which are due or to become due to the judgment debtor, until the further order of the court or the termination of the proceeding, whichever occurs first. The third party may not be obliged to withhold the payment of any moneys beyond double the amount of the judgment sought to be enforced by the judgment creditor. The court may punish any party who violates the restraining provision of a citation as and for a contempt, or if the party is a third party may enter judgment against him or her in the amount of the unpaid portion of the judgment and costs allowable under this section, or in the amount of the value of the property transferred, whichever is lesser.

(2) The court may enjoin any person, whether or not a party to the supplementary proceeding, from making or

allowing any transfer or other disposition of, or interference with, the property of the judgment debtor, or the property or debt concerning which any person is required to attend and be examined until further direction in the premises. The injunction order shall remain in effect until vacated by the court or until the proceeding is terminated, whichever first occurs.

(e) If it appears that any property, chose in action, credit or effect discovered, or any interest therein, is claimed by any person other than the judgment debtor, the court shall, as in garnishment proceedings, permit or require the claimant to appear and maintain his or her right. The rights of the person cited (other than the judgment debtor) and the rights of any adverse claimant shall be asserted and determined pursuant to the law relating to garnishment proceedings.

(f) Costs in proceedings authorized by this Section shall be allowed, assessed and paid in accordance with rules.

(g) This Section is in addition to and does not affect enforcement of judgments or proceedings supplementary thereto, by any other methods now or hereafter provided by law.

(h) This Section does not grant the power to any court to order installment or other payments from or compel the sale, delivery, surrender, assignment or conveyance of any property exempt by statute from the enforcement of a judgment thereon, a deduction order, garnishment, attachment, sequestration, process or other levy or seizure.

(1) An order, judgment, citation or injunction under this Section that relates to a security which is transferable as provided in Section 8-320 of the Uniform Commercial Code[1] may be entered only against the judgment debtor, against a person who carries on his, her or its books an account in the name of the judgment debtor in which an interest in that security is reflected or against the person to whom the judgment debtor has pledged that security.

P.A. 82-280, § 2-1402, eff. July 1, 1982. Amended by P.A. 84-1043, § 1, eff. Nov. 26, 1985.

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[1]Chapter 26, ¶ 8-320

Supreme Court, U.S.
FILED
JAN 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1091

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROGER R. LARSON,

Petitioner,

vs.

GENE C. O'CONNELL, FOX PROPERTIES, INC., JAMES A. CHILIGIRIS, A.A. PALOW, CHARLES R. BRILLMAN, GILBERT J. OBERLIN, JOHN DONALDFERRY, BERLE W. BURHENN, AND IVAN TELLEFSON,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the trial court had personal jurisdiction over the Petitioner, Roger R. Larson.

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STATEMENT OF THE CASE

In 1983, a citation issued pursuant to Illinois Revised Statutes, Chapter 110, Section 2-1402 was served upon Petitioner Roger Larson as a corporate officer of judgment debtor, Pharmaco, Inc., a corporation. Said statute sets forth the powers of an Illinois court in passing upon a citation proceeding which powers specifically include, inter alia:

1. The power to compel any third person cited to deliver up assets belonging to the judgment debtor for application against the judgment. Section 2-1402 (B)(3).

2. The power to enter any order against a person cited that could be entered in a garnishment proceeding. Section 2-1402 (B)(4).

3. The power to enjoin any person, whether or not a party to the supplemental proceeding, from making or allowing any transfer or other disposition, etc., of property of the judgment debtor. Section 2-1402 (D)(2).

4. Where it appears any property or interest therein is claimed by any person other than the judgment debtor, the court shall, as in garnishment proceedings, permit such person to appear and assert his claimed right. Section 2-1402 (E).

After receipt of said citation and with constructive notice of the scope of relief the court could enter thereunder, Roger Larson first appeared in court by counsel on November 21, 1983, at which time he requested a continuance which was granted.

On December 7, 1983, Larson personally appeared at which time the court ordered him to submit to a sworn examination and to produce records.

On January 25, 1984, Larson appeared and gave a sworn statement in open court. During the course thereof, an attorney for the Respondents orally asked the court to order Larson to account for funds that he had received from the corporation, which funds were disclosed in the sworn examination. At this juncture, Larson objected to such an order being entered contending that the corporation had ratified his receipt of the funds. The court ordered Larson to render an accounting and continued the proceedings until February 21, 1985.

On February 20, 1985, Respondents filed a motion for leave to file a creditor's bill specifically naming Larson as an additional party pursuant to Section D (1) and (2) of the Illinois Citation Statute, Ill. Rev. Stat., Ch. 110, Section 2-1402.

On February 21, 1985, Larson appeared by counsel on his own behalf and filed a written motion to quash the service of the citation or alternatively to dismiss the citation with prejudice. This motion was ultimately denied on June 4, 1985.

On approximately April 10, 1985, the Respondents filed a motion for judgment or other relief. On April 11, 1985, Roger Larson, again on his own behalf, by counsel, filed a document styled "Brief Setting Forth Citation Defendant's Objections to the Citation Proceeding." On June 4, 1985, the court entered a docket order noting that "Citation Defendant" Roger Larson's Motion to Dismiss with prejudice was denied.

At a hearing on June 13, 1985, Larson appeared pro se. On that date, Respondents filed motions requesting that Larson turn over certain money obtained by him from Pharmaco and requesting

additional information. The request for additional information was allowed and ruling on the request to turn over money was reserved.

On June 20, 1985, Larson filed supplemental answers to the request for production. The lead paragraph of the supplemental answer stated that it was in compliance with the court's order and was being filed by "Roger R. Larson, one of the defendants."

On July 30, 1985, the parties next appeared. At that time, counsel for Larson made an oral motion to withdraw which the court allowed. Larson then proceeded to file a pro se memorandum in opposition to the request to turn over money.

The parties next appeared in court on August 6, 1985, with Larson appearing pro se and filing a document captioned "Answer to Response to Reply Memorandum of Citation Defendant Roger Larson." A hearing was held on all pending motions. At the conclusion of the hearing, Larson was ordered to pay the Pharmaco judgment plus costs and interest within 30 days. On August 29, 1985, Larson individually filed a pro se motion to alter or amend the judgment and a motion for stay of citation proceedings, all of which were denied. On the same date, he orally moved for a change of venue in response to which the court directed the motion be in writing. A written motion for change of venue was never filed, rather on August 30, 1985, Larson filed a notice of appeal.

The foregoing facts are generally summarized in the Appellate Court's opinion contained on pages 2 through 6 of the appendix to the Petition for a Writ of Certiorari herein.

ARGUMENT

MAY IT PLEASE THE COURT:

A court may obtain in personam jurisdiction either through formal service of process or by a party generally appearing before a court. A review of the record correctly led the Illinois Fourth District Appellate Court to conclude that Roger Larson had generally appeared before the trial court and had personally contested the procedure on its merits with knowledge that the Respondents sought to satisfy their judgment against Pharmaco from funds of Pharmaco that Roger Larson had previously taken personal possession of and with knowledge that the proceeding was being conducted pursuant to the Illinois Citation Statute, Ill. Rev. Stat. Ch. 110, Section 2-1402. The statute empowers a court to reach assets belonging to the judgment debtor that are in the possession of a third party. The trial court's action met the due process of law requirements imposed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

A. A COURT OBTAINS PERSONAL JURISDICTION OVER A PERSON WHO GENERALLY APPEARS THEREIN AND CONTESTS MATTERS ON THE MERITS.

It has long been recognized that where a person appears in court and contests matters on the merits that the court has obtained personal jurisdiction over that person and it is not necessary to thereafter make formal service of process to obtain such jurisdiction. *Peoria Tribe or Band of Indians v. Wea Townsite Co.*, 117 F. 2d 940, 942 (10th Cir. 1941); *Nelson v. Jadrijevics*, 59 F. 2d 25, 27 (5th Cir. 1932); *Wefel v. W.P. Brown & Son Lumber Co.*, 58 F. 2d 667, 668

(S.D. Ala. 1932); and *Carcelli v. Order of United Commercial Travelers of America*, 47 F. Supp. 433, 433-4 (W.D. Penn. 1942).

Since early days, this court has uniformly held that "an appearance cures any defect in the service of process." *Farrar and Brown v. The United States*, 28 U.S. 459 (1830); see also *Creighton v. Kerr*, 87 U.S. 8, 12 (1874) and *Atkins v. The Fiber Disintegrating Company*, 85 U.S. 272 (1874).

There is no doubt that Roger Larson had actual notice of the proceeding, had actual notice that the Respondents sought to satisfy a judgment against Pharmaco from funds that Roger Larson was holding, and that they sought to do this through the Illinois Citation Statute which statute empowers a court to attach funds in the possession of a third party and to enter an order requiring a third party to pay a judgment where the third party held funds belonging to the judgment debtor. Clearly, he was advised of the nature of the proceedings. There was a period of almost two years between the date that the citation was initially served on him as corporate officer of Pharmaco and the date the judgment complained of herein was entered against him. During this period, Roger Larson, both pro se and by counsel, made numerous court appearances and filed numerous documents, many of which unequivocably characterized him as a party to the proceeding. Thus, Roger Larson with notice of the proceeding and with notice of the relief sought, entered a general appearance and strenuously defended. Certainly, the requirements of due process were satisfied under the facts of this case. e.g., *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

The Petitioner cites *Pennoyer v. Neff* in support of his Petition. 95 U.S. 714 (1878). In the passage quoted by petitioner, this court in dicta recognized that voluntary appearance in court conferred personal jurisdiction over a defendant. 95 U.S. at 733.

While this statement is helpful to the Respondents herein, nevertheless, they would note that this is merely dicta as the holding of *Pennoyer* was that to obtain in personam jurisdiction by service of process, personal service must be made within the state. While not germane to the issue presented by the Petition for Writ of Certiorari, it is to be noted that this holding of *Pennoyer* was substantially modified by this court in the case of *International Shoe Company v. State of Washington* wherein this Court applied the minimum contacts test in upholding service of process made under a state's long-arm statute. 326 U.S. 310 (1945).

B. THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION.

In his enunciation of questions presented, the Petitioner states that the trial court lacked subject matter jurisdiction as well as personal jurisdiction. In his advancements of reasons for granting the writ, the Petitioner appears to only be questioning an alleged lack of personal jurisdiction. Accordingly, Respondents will not address at length the question of subject matter jurisdiction. Lack of subject matter jurisdiction was raised by the Petitioner in the Illinois Appellate Court. This claim was rejected. Clearly whether the Illinois trial court had subject matter jurisdiction is not a question involving the federal constitution, but is a question involving the Constitution and Statutes of the State of Illinois. Under the

Illinois Constitution of 1970, Article 6, Section 9, and under Ill. Rev. Stat., Ch. 110, Section 2-1402, the trial court clearly had subject matter jurisdiction. See Appellate Court opinion at pages 6 and 7 of Appendix to the Petition for Writ of Certiorari.

CONCLUSION

This case involves whether as a matter of fact the trial court had in personam jurisdiction over petitioner Roger R. Larson by virtue of his general appearance and contesting of the issues. The trial court thoroughly examined the factual situation and correctly concluded that Roger Larson had entered a general appearance, was advised of the issues and in fact defended on the issues. The dictates of due process were met. Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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